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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city
and municipal corporation,
Petitioner,

VS.

THE OAKLAND RAIDERS; ALLEN DAVIS;
EDWARD W. MCGAH; LOUIS F. BARROERO;
FRANK IVALDI; SHELDON MILENBACH; JOHN BROOKS;
EUGENE BOSCACCI; JULIUS S. HARTMAN; GLADYS SARGENT;
HENRY TRIONE; RALPH J. VAIL; W. H. WINKENBACH;
E. J. MCGAH; DYNAMIC DEVELOPMENT CO.;
OLIVER HOMES, INC.; ARNOLD BOSCACCI;
ANDREWS CONSTRUCTION CO.; RALPH J. VAIL, Trustee; and
LOS ANGELES MEMORIAL COLISEUM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Should the decision in *Garcia v. San Antonio Metropolitan Transit Authority* be extended to prohibit the City of Oakland's effort to acquire a National Football League franchise by the inherent State sovereign power of eminent domain, solely because of the dormant power of Congress under the Commerce Clause?

2. May the City's eminent domain action be precluded by the Commerce Clause even though any burdens on interstate commerce would be caused by City participation in the market, rather than regulation of the market?

3. In any event, may the City's action be barred by the Commerce Clause where the speculative adverse effects of City acquisition on the commerce of the National Football League would be indirect and insubstantial?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

Petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeal of California, First Appellate District, entered November 15, 1985, declaring that the dormant power of Congress under the Commerce Clause precludes acquisition by eminent domain of the National Football League franchise and related property of the Oakland Raiders. Petitioner further requests that this Court enter an order of summary reversal. Sup. Ct. R. 23.1.

OPINION BELOW

The opinion of the Court of Appeal of California, First Appellate District, dated November 15, 1985 (Appendix A, 1a-8a.), is reported at 174 Cal.App.3d 414, 220 Cal.Rptr. 153 (1985). The summary decision of the California Supreme Court not to review the merits of the Court of Appeal opinion, dated February 27, 1986, (Appendix B, at 9a) is not reported.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeal of California, First Appellate District, was issued on November 15, 1985. That court denied a petition for rehearing on December 12, 1985. The Supreme Court of California denied a petition for review of the Court of Appeal decision on February 27, 1986.

This petition is filed within ninety days of the date on which the highest state court refused to review the decision. See *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

This Court's jurisdiction is invoked under 28 United States Code § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, § 8, cl. 3: "The Congress shall have Power . . . to regulate Commerce . . . among the several States. . . ."

United States Constitution, Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Petitioner City of Oakland ("the City") seeks review of a judgment of the Court of Appeal of California, First Appellate District, affirming the dismissal of the City's eminent domain action to acquire the National Football League franchise and related property of the Oakland Raiders. At stake in this case is

the ability of state and local governments to condemn property, the potential use of which is alleged to conflict with the dormant powers of Congress under the Commerce Clause.

This eminent domain action was brought by the City on February 22, 1980, when the Oakland Raiders National Football League franchise was preparing to move from Oakland, California, to Los Angeles, California. The franchise originated in Oakland in 1960, and provided the impetus for construction of a publicly-financed sports stadium in Oakland in 1966. The franchise enjoyed substantial public and private support from 1960 to 1980 in Oakland, and attracted capacity crowds for thirteen consecutive seasons. This action was commenced so that the City could maintain the public recreation and related public social, psychological, economic, and image-enhancement benefits associated with the presence of the City's preeminent sports franchise.

When this action was dismissed by the summary judgment of the trial court in 1980, the City appealed; the Supreme Court of California reversed the dismissal in 1982 and remanded the case for trial. *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P.2d 835 (1982). When, in an unrelated action, the United States District Court (C.D. Cal.) declared the National Football League's franchise transfer rules to be invalid under the Sherman Antitrust Act in 1982, the Raiders' franchise began operations in Los Angeles. See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1386 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984).

This eminent domain action went to trial in 1983. The trial court found that the presence of the Raiders in Oakland provides public recreation, that recreation is a need of the public, and that professional football in Oakland provides a significant benefit to the City, in part because the presence of the Raiders "enhances good interracial relations" in Oakland. In addition, the court found that the economy of Oakland would suffer if the franchise were to be removed from the City. 3 C.T. 1474-1476.

Nevertheless the trial court entered judgment in August, 1983, dismissing the action on five independent grounds. That decision

was vacated by the Court of Appeal of California, First Appellate District, and the case was remanded to the trial court for rulings on the remaining issues in the case. *City of Oakland v. Superior Court*, 150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983).

The trial court then again dismissed the action, concluding, *inter alia*, that the eminent domain action was barred by the dormant Commerce Clause.[1] The Court of Appeal of California, First Appellate District, affirmed the judgment of dismissal, addressing only the question of the impact of the dormant Commerce Clause upon the state's inherent power of eminent domain. *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414, 220 Cal.Rptr. 153 (1985); Appendix A. The Supreme Court of California declined to review the decision of the Court of Appeal. Appendix B, at 9a.

The decision of the Court of Appeal of California, which the City asks this Court to review, held that acquisition of the franchise by the City would substantially burden interstate commerce, and that the dormant power of Congress under the Commerce Clause precluded the City's exercise of eminent domain in this case.

REASONS FOR GRANTING THE WRIT

The California court's decision should be reviewed by this Court because it conflicts in principle with decisions of this Court, with decisions of the highest courts in other states, and with a contemporaneous decision of the Ninth Circuit Court of Appeals which also involves the location of the Raiders' franchise. If not reversed, the California decision will establish an unwarranted extension of this Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), because the decision subjects essential attributes of State sovereignty to chal-

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[1] What is "dormant" is the power of Congress to regulate commerce. See *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). The phrase "dormant Commerce Clause" has been adopted as a shorthand reference. See Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 n. 1 (1982).

lenge solely because of Congressional inaction under the Commerce Clause. If the lower court decision is not reversed, persons dissatisfied with any local government action will be encouraged to challenge that action on the ground that it might burden a private business interest which is engaged in interstate commerce—even where, as here, that business itself has interposed no objection.

The decision below is contrary to the decision of this Court in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), and inconsistent with *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). The California court decision also conflicts in principle with this Court's decisions in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), because the supposed burdens on commerce identified by the lower court are almost exclusively the result of anticipated actions by the City as a participant in the marketplace.

The California decision also is inconsistent in principle with all other decisions of highest state courts which have considered challenges to state eminent domain actions based on the dormant Commerce Clause. Such challenges have been rejected even when the property sought to be acquired was a portion of an interstate railway. *Elberton Southern Railway Co. v. State Highway Dept.*, 211 Ga. 838, 841, 89 S.E.2d 645, 649-650 (1955); *Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 270 Ill. 399, 415-423, 110 N.E. 583, 589-592 (1915); *Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1* (Tex.Civ.App.) 76 S.W.2d 147 (1934), cert. denied, 295 U.S. 762 (1935).

The lower court decision also is in conflict with the principles of law applied by the Ninth Circuit Court of Appeals with respect to the same franchise move from Oakland to Los Angeles, and the same basic issue: the extent to which the Commerce Clause affects the ability of individual NFL franchise owners to determine the location of the franchise. In *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d

1381 (9th Cir.) cert. denied, 105 S.Ct. 397 (1984), the Ninth Circuit concluded that NFL attempts to keep the Raiders' franchise in Oakland violated antitrust laws enacted by Congress under authority of the Commerce Clause. In this case, the California court has held that the City may not acquire the franchise because the City's desire to locate the franchise in Oakland would offend NFL interests, thereby violating the dormant Commerce Clause. For purposes of resolving the issue of franchise location, the Ninth Circuit treated the NFL member teams as "independent and competitive with one another." 726 F.2d at 1389. However, in its ruling in this case, the California court found that the NFL essentially is a single entity or "joint venture." Appendix 6a. The Ninth Circuit found that Congress intended the public interest in competition among franchise owners to outweigh NFL interests in keeping the franchise in Oakland; the California court found that the Oakland public interest in retaining the franchise was outweighed by the NFL's supposed adverse interest in franchise location. The legal reasoning and results in the Ninth Circuit case and California case cannot be reconciled.

Finally, the California decision implicitly extends this Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), into an area which is not warranted by the reasoning of that decision. In *Garcia*, this Court held that comprehensive Congressional legislation in the field of mass transit, enacted pursuant to the authority of the Commerce Clause, overrode inconsistent state determinations of transit employee minimum wage and overtime pay. There, this Court found that the federal political process which resulted in Congressional action was sufficient to protect State sovereign interests from erosion of the guarantees provided by the Tenth Amendment. Here, however, Congress has not acted. No Congressional legislation affecting State eminent domain powers was relied on by the California court below. Eminent domain, an essential and inherent attribute of state sovereignty, should not be defeated by Congressional inaction under the Commerce Clause.

The decision which the City asks this Court to review exposes almost every State eminent domain action to attack upon dor-

mant Commerce Clause grounds. The rationale of the California Court of Appeal could be applied to acquisition of businesses and property in redevelopment areas (*Berman v. Parker*, 348 U.S. 26 (1954)), or municipal bus lines (*In re Fifth Avenue Coach Lines, Inc.*, 18 N.Y.2d 212, 273 N.Y.S.2d 52, 219 N.E.2d 410 (1966); *Milwaukee & Suburban Transport Corp. v. Milwaukee County*, 82 Wis.2d 420, 263 N.W.2d 503 (1978)), or portions of an interstate railway (*Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984)), or even land acquired for redistribution to tenants (*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). The power of eminent domain is coterminous with the scope of the local government's police power (*Id.* at 240); it is a means by which the sovereign may provide for the public welfare Therefore, a great many local government activities could be challenged on grounds similar to those relied upon by the State Court of Appeal. That court's decision, if followed, would invalidate local government ownership of sports franchises. Indeed, the universally accepted concept of public ownership of sports stadiums would be subject to attack for the same reasons relied upon by the California court here. See *City of Oakland v. Oakland Raiders*, 32 Cal.3d at 70-72, 183 Cal.Rptr. at 679-681, 646 P.2d at 841-842.

It may be, as stated by the court below, that regulation of sports league franchise relocation "should come from Congress; only then can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a uniform manner." Appendix 7a-8a (footnote omitted). But at least until Congress takes such action, States should be free to exercise their sovereign powers in the public interest.

ARGUMENT

I

THE LOWER COURT DECISION SHOULD BE REVERSED BECAUSE IT AUTHORIZES THE JUDICIARY TO ABROGATE STATE SOVEREIGN POWERS OF EMINENT DOMAIN SOLELY ON DORMANT COMMERCE CLAUSE GROUNDS, CONTRARY TO *HAYFIELD NORTHERN RAILROAD*, AND WITHOUT THE MINIMUM FEDERAL POLITICAL PROTECTION OF TENTH AMENDMENT RIGHTS REQUIRED BY *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

The City's power to acquire the Raiders' NFL franchise by eminent domain should be affirmed in the absence of any inhibiting action by Congress pursuant to the Commerce Clause. Here, Congress has taken no action to interfere with the City's inherent eminent domain power.

This Court held long ago that, "in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. . . . This power [is] denominated the *eminent domain*. . . ." *West River Bridge v. Dix*, 47 U.S. (6 How.) 507, 531 (1848). The power of eminent domain has been called an "inherent" attribute of sovereignty, "universally" recognized and "necessary to the very existence of government." 1 Nichols on Eminent Domain §§ 1.11, 1.14[2] (3d ed. 1980). Until the decision of the California Court of Appeal in this case, no eminent domain action has been prohibited by any Constitutional restraint other than those specifically relating to the taking of property found in the Fifth Amendment: due process, public use, and just compensation.

In *West River Bridge*, 47 U.S. (6 How.) at 531, this Court rejected a challange to the State's eminent domain power based on the Contract Clause, Article I, section 10 of the Constitution, concluding as follows:

> The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the Supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self preservation.

This Court recently affirmed that "the Contract Clause has never been thought to protect against the exercise of the power of eminent domain." *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 243 n. 6. An identical conclusion can and should be reached with respect to the dormant Commerce Clause. If there is a hierarchy of States' rights protected by the Tenth Amendment, the power of eminent domain must be considered to be among the most important. If there is a hierarchy of potential Constitutional restraints on the States' eminent domain powers, claims based on the dormant power of Congress under the Commerce Clause must be considered to be among the least substantial. Even if Congress may strip the City of its eminent domain powers by action taken under the Commerce Clause, no court should imply an intent to prohibit such acquisitions in the absence of considered and direct action by Congress.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, this Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), stating that "the model of democratic decision-making the Court there identified underestimated, in our view, the solicitude of the national political process for the continuing vitality of the States." 105 S.Ct. at 1021. In concluding that a municipal transit system was subject to the Fair Labor Standards Act, this Court noted the extensive involvement of Congress in public mass transit:

> Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.

105 S.Ct. at 1020 (footnote omitted).

In the present case there has been no Congressional "political process" to protect the "continuing vitality" of the states' sovereign eminent domain interests. Instead, the California court has interposed its view of what Congress might have done had it considered the effects of this acquisition upon interstate commerce.

This Court in *Garcia* observed that "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 1020. This Court carefully limited its decision in *Garcia* to the facts before it, and noted that those facts "do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Ibid.*

This case directly presents a question left open for consideration by *Garcia*: whether the exercise of State eminent domain powers may be prevented by the dormant Commerce Clause. That question must be answered in the negative because of this Court's recent decision in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984). Even though the issue in *Hayfield* was discussed in terms of the preemption doctrine, and the California court ruling here is based on the dormant Commerce Clause, the basic issue is the same in both cases: the effect upon a state's power of eminent domain of Congressional *inaction* under the Commerce Clause. In *Hayfield*, Minnesota law permitted a state eminent domain action to acquire an abandoned railway line. The railroad argued that the state condemnation action was preempted by the Staggers Rail Act, which was enacted by Congress pursuant to its Commerce Clause powers, and which regulated the process by which rail carriers could abandon unprofitable lines. This Court rejected the railroad's contention in language that is determinative here:

> This Court has repeatedly affirmed . . . that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter

> permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). In this case, Congress has *not* "unmistakably ordained" that the States may not exercise their traditional power of eminent domain over railroad property that has been abandoned; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of abandoned railroad property. Nor is there any indication that the subject matter at issue here—abandoned railroad property—is of the sort that "permits no other conclusion" but that it is governed by federal and not state regulation. After all, state law normally governs the condemnation of ordinary [unregulated] real property.

467 U.S. at 632.

Here, Congress has not "unmistakably ordained" that the City's condemnation action be prohibited. Moreover, the *Hayfield* decision upheld state eminent domain power even where, unlike here, Congress extensively regulated the subject of the condemnation under its Commerce Clause power. The decision of the lower court and the decision in *Hayfield* cannot be reconciled.

II

THE LOWER COURT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WHITE V. MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYEES, INC.*, BECAUSE THE SUPPOSED BURDENS ON INTERSTATE COMMERCE ARISING OUT OF THE CITY'S ACQUISITION OF THE RAIDERS' NFL FRANCHISE WOULD BE THE RESULT OF CITY PARTICIPATION IN THE MARKET, NOT REGULATION OF THE MARKET

When a local government acts as a market *participant*, rather than as a market *regulator*, the dormant Commerce Clause places no limitation upon the local government's activities. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). "[W]hen a state or local government enters the market as a

participant it is not subject to the restraints of the Commerce Clause." *White*, 460 U.S. at 208. In this kind of case, there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.' " *Reeves*, 447 U.S. at 436 n. 7. See: *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93-95 (1984); *White*, 460 U.S. at 208.

The California Court of Appeal concluded that *White*, *Reeves*, and *Alexandria Scrap* were inapplicable to the City's acquisition of the Raiders' franchise and related property because "the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's 'most awesome grant of power'—eminent domain." Appendix 4a. The lower court's conclusion rested upon its belief that the "commerce clause applies to 'actions taken by states in their sovereign capacity' but does not limit proprietary activity." *Ibid.*

Contrary to the lower court's analysis, this Court in *White*, *Reeves*, and *Alexandria Scrap* made no distinction between the government's "proprietary" and "sovereign" powers in participating in the marketplace. The lower court's sole reference for its distinction between proprietary and sovereign powers is a citation to *Reeves*, 447 U.S. at 437. Appendix 4a. *Reeves* makes no such discrimination, but instead emphasizes the "basic distinction . . . between States as market participants and States as market regulators." 447 U.S. at 436-437. In fact, the decision in *Reeves* is directly opposite to the Court of Appeal's conclusion. This Court held that, once a local government decides to participate in the market, it does so *both* as a sovereign and as a business entity, and it does so outside the scope of the Commerce Clause. "When a State buys or sells, it has the attributes of both a political entity and a private business." 447 U.S. at 439 n. 12.

In *White*, *Reeves*, and, to a lesser extent, *Alexandria Scrap*, this Court considered the historical purpose of the Commerce Clause, concepts of State sovereignty, and marketplace characteristics in reaching its conclusions. The most important consideration is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place"; the Commerce Clause was not designed

"to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 437.

While the "precise contours of the market-participant doctrine have yet to be established" (*South-Central Timber Development, Inc.*, 467 U.S. at 93), where the local government actually participates in the marketplace, and where the market participation involves integral government functions or the exercise of sovereign powers, there should be immunity from even direct Congressional interference under authority of the Commerce Clause. *Reeves*, 447 U.S. at 437-439 (Blackmun, J., majority opinion) and 447 U.S. at 449-450, 451 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting opinion).

The right of eminent domain sought to be exercised here is a fundamental and inherent attribute of sovereignty. See generally *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 239-245.

> No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. . . . The right is the offspring of political necessity. . . .

Kohl v. United States, 91 U.S. 367, 371 (1876). See also *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (the exercise of the power of eminent domain is "intimately involved with sovereign perogative").

In this case, the purpose of the eminent domain action is to provide public recreation and the important public benefits related to the retention of the NFL franchise in Oakland. As the Supreme Court of California recognized in its 1982 opinion in this case, such objects are legitimate governmental purposes. *City of Oakland v. Oakland Raiders*, 32 Cal.3d at 70-72, 183 Cal.Rptr. at 679-681, 646 P.2d at 841-842 (surveying state court decisions from California, New Jersey, Pennsylvania, and Ohio). These benefits are part of the package of benefits traditionally provided by local governments through the use of eminent domain. As this Court held in *Berman v. Parker*, 348 U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424. The

> values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

"[T]he power of eminent domain is merely the means to the end." *Ibid.* See also *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 240. Providing public recreation and its related benefits is a traditional governmental function and exercise of local sovereignty. Whether the benefits are provided by public subsidy of professional sports teams, or by acquisition of the stadium or the franchise itself, should be irrelevant to Commerce Clause considerations. The speculative "burdens" on the NFL's commerce, even if accepted as legitimate, are "burdens" which can be caused by the City only as a market participant after acquisition by eminent domain. How the City enters the marketplace—by expenditure of public funds in the open market or by the condemnation process—should be held to be immaterial under the market participant doctrine.

The court below misinterpreted *White*, *Reeves*, and *Alexandria Scrap* in concluding that the exercise of governmental power to enter the marketplace permits dormant Commerce Clause review by the judiciary. To avoid this distortion of its precedents, this Court should review and reverse the judgment below.

III

EVEN IF THE CITY'S POTENTIAL ACTIONS FOLLOWING ACQUISITION OF THE RAIDERS' NFL FRANCHISE WERE DETERMINED TO BE BURDENS ON INTERSTATE COMMERCE, THEY WOULD BE INDIRECT AND INSUBSTANTIAL, AND NOT UNDUE BURDENS PROHIBITED BY THE COMMERCE CLAUSE

Even assuming that the judiciary may consider the dormant Commerce Clause in evaluating the City's exercise of its eminent domain power, the lower court misapplied Constitutional principles in concluding that the action imposed an impermissible

burden upon interstate commerce. Appendix 5a-8a. Burdens which are not direct and substantial burdens upon interstate commerce do not violate the Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In this case, the National Football League can eliminate any burden on its commerce caused by City acquisition of the franchise, simply by applying or amending the NFL constitution and by-laws. An analysis of the supposed burdens to be endured by the NFL as a result of this action demonstrates that all of the burdens found by the lower court are in fact controllable by the NFL itself.

The California court first held that "each League franchise owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner." Appendix 6a. The court, however, also noted the NFL's ability to eliminate any burden resulting from City acquisition: "Thus under League bylaws, new members must first be approved by the current members." (*Ibid.*) The City has been prepared to comply with any legal regulation of the NFL. In fact, the City has developed a possible plan for retransfer of the franchise to a profit-making entity which, according to NFL counsel, "would not run afoul of [NFL rules] as written." (RT 4954.)

The second "burden" perceived by the lower court was the potential adverse effect of the "new owner's allegiance to the local public interest" caused by the franchise being "permanently indentured to the local entity." Appendix 6a. Long-term commitments to communities of "at least" twenty to twenty-five years are common in the League. (RT 4905.) If long-term "indentures" to a local community are burdensome to the NFL, it may simply amend its rules to control the length of franchise commitment to location. In *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984), it was held that the federal antitrust laws, enacted by Congress under authority of the Commerce Clause, precluded NFL regulation of franchise location. If attempts by the NFL to control franchise location are violations of the federal antitrust laws, then, *ipso facto*, any City determinations of its own franchise's location cannot violate the Commerce

Clause. The Raiders' successful challenge of the NFL relocation requirements on antitrust grounds conflicts in principle with the lower court's "joint venture" characterization of the NFL. Appendix 6a. The anomaly of the lower court's decision is that it is the Raiders, not the City, who have "burdened" the League by moving to Los Angeles in violation of NFL rules. The City and the NFL want the Raiders in Oakland; the Raiders do not.

Another expressed concern of the lower court was that "the [NFL's] interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc." Appendix 6a. Most NFL teams now have leases with publicly-owned stadiums which directly affect such matters. Here again, if NFL interests in such matters are adversely affected by City acquisition or operation, the NFL may alter its rules to remove such burdens.

Finally, the fear that "a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation" (Appendix 6a), is unwarranted. If governmental entities seek to acquire franchises by eminent domain, they must pay the price. That price is full fair market value. As in any eminent domain action, that value will represent whatever price the franchise could bring on the open market—and cannot illegally affect any existing or prospective business transactions of the franchise owners.

The foregoing reasons on which the California Court of Appeal relied were rejected in analogous circumstances by this Court in *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 125-129 (1978). There, this Court considered a Commerce Clause challenge to a Maryland statute that required out-of-state producers and refiners of petroleum products to divest themselves of all company-operated retail service stations in Maryland, and held that the Commerce Clause does not protect or preserve any particular method of operation, but responds primarily to direct regulation, discrimination, or excessive taxation. 437 U.S. at 127. Exxon argued that because of the nationwide importance of

petroleum products and the possibility of other states enacting similar legislation, the Commerce Clause prohibited state regulation. This Court rejected Exxon's "novel suggestion" and held that in the absence of Congressional action, or a showing of a specific discrimination against, or undue burdening of, interstate commerce, the Court could not conclude that the States were without power to regulate in the area. 437 U.S. at 128-129.

The California court's decision also conflicts in principle with court decisions in three states which have considered Commerce Clause objections to eminent domain proceedings. Condemnation of interstate railroad property was upheld in Georgia (*Elberton Southern Railway Co. v. State Highway Dept.*, 211 Ga. 838, 841, 89 S.E.2d 645, 649-650 (1955)), in Illinois (*Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 270 Ill. 399, 415-423, 110 N.E. 583, 589-592 (1915), and in Texas (*Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1* (Tex.Civ.App.) 76 S.W.2d 147 (1934), cert. denied, 295 U.S. 762 (1935)). All of these cases involved far more burdensome effects on interstate commerce than those identified by the California Court in the present case.

In *Elberton*, the railroad resisted condemnation for highway purposes of a strip of railway land. The railway company alleged that the acquisition "would seriously impair, if not completely destroy, its power to perform its public duty as a common carrier of interstate commerce." 211 Ga. at 840, 89 S.E.2d at 648-649. The Supreme Court of Georgia nevertheless held that demurrers were properly sustained to the railway company's allegations because they were "insufficient to show any undue interference with or burden upon interstate commerce." 211 Ga. at 841, 89 S.E.2d at 649-650.

In *Western Union Telegraph Co.*, the Supreme Court of Illinois held that the condemnation of a portion of property belonging to an interstate railway company did not violate the Commerce Clause. The state court held that the acquisition of property within Illinois under the State's sovereign power of eminent domain did not conflict with the history and purposes of the Commerce Clause. 270 Ill. at 415-423, 110 N.E. at 589-592.

In *Tarrant County*, a water district sought to condemn railway property being used in interstate commerce. The railway alleged that the state's power of eminent domain could not be exercised without approval of the federal government. The Texas court held that the "right of the state to exercise its power of eminent domain has not been surrendered to the federal government, even though interstate commerce may be indirectly or incidentally involved," and that federal approval was neither sought nor required. 76 S.W. 2d at 148.

State regulations which potentially would put an interstate carrier out of business have been upheld by this Court. In *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U.S. 394 (1921), this Court approved an order of the New Jersey Public Utilities Commission requiring a railroad to make and pay for the cost of certain safety improvements. The railroad contended that compliance with the order would bankrupt it. This Court held that, "if the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortune the stopping may produce." *Id.* at 411.

The "regulation" of interstate commerce described by the lower court is not direct; it is, at most, incidental and insubstantial. The City does not seek to regulate NFL activity, but instead seeks only to acquire an NFL franchise. Under *Pike v. Bruce Church, Inc.*, the indirect and incidental effects of acquisition, even if termed "regulation," cannot constitute an impermissible burden on interstate commerce.

CONCLUSION

The California Court of Appeal held that the City of Oakland may not acquire the Raiders' NFL franchise by exercise of the State's sovereign power of eminent domain, solely because of the dormant powers of Congress under the Commerce Clause. The California court held that City acquisition of the franchise would unduly burden the commerce of the NFL, even though the NFL itself did not object to the acquisition. This decision conflicts in principle with decisions of this Court as well as with decisions of the Ninth Circuit and other State courts. The California court implicitly has extended this Court's ruling in *Garcia* beyond its reasonable limits, and has distorted the market participation doctrine established by this Court. Review and reversal of the California decision is necessary to prevent unwarranted attacks—based on dormant Commerce Clause grounds—on State and local government actions. The judgment of the California Court of Appeal should be reviewed and summarily reversed.

Dated: May 27, 1986.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE CITY OF OAKLAND, a charter city and municipal corporation,
Plaintiff and Appellant,

v.

THE OAKLAND RAIDERS, et al.,
Defendants and Respondents.

A029031

(Monterey County
Sup.Ct. No. 76044)

Filed Nov. 15, 1985

Plaintiff City of Oakland appeals from a judgment after a court trial in favor of defendants Oakland Raiders, et al. We have determined that plaintiff's proposed exercise of eminent domain power would, in this case, violate the commerce clause of the United States Constitution. Accordingly, we affirm.

I

Facts and Procedure

Plaintiffs sued in 1980 to acquire by eminent domain the property of defendants Oakland Raiders (Raiders), a National Football League (NFL or League) franchise. The Alameda County Superior Court issued a preliminary injunction prohibiting transfer of the franchise from Oakland, the case was transferred to Monterey County (Code Civ. Proc., § 394), and summary judgment was entered for defendants. On appeal the Supreme Court reversed, holding our eminent domain statute allowed condemnation of intangible property and that plaintiff had a right to show whether its attempted exercise of eminent domain over the Raiders franchise would be a valid public use.

(*City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60 [*Raiders I*].) We subsequently granted a peremptory writ of mandate directing the trial court to hold a hearing on plaintiff's application for reinstatement of the preliminary injunction against transfer of the franchise from Oakland. (*City of Oakland v. Superior Court* (1982) 136 Cal.App.3d 565 [*Raiders II*].) In the meantime, however, Raiders home games were played in Los Angeles. In early 1983 the trial court reinstated and modified the injunction against transfer, providing that all 1983 Raiders home games for the 1982 season would be played in Oakland "unless and until judgment after trial is entered in favor of [d]efendants before the beginning of the 1983 season." After trial in May 1983 the court entered judgment against plaintiff. Following various procedural maneuvers by plaintiff we issued an alternative writ of mandate, denied plaintiff's requested stay of judgment, and eventually issued a writ of mandate ordering the trial court to (i) vacate its judgment and (ii) proceed to determine those remaining objections to plaintiff's eminent domain action that it had not previously ruled on. (*City of Oakland v. Superior Court* (1983) 150 Cal.App.3d 267, 279-280 [*Raiders III*].)

On remand the court again entered judgment for defendants. Its decision is based primarily on three independent grounds: (1) that plaintiff's stated purpose is not a public use; (2) that plaintiff's action is invalid under federal antitrust law; and (3) that plaintiff's action is invalid under the commerce clause of the federal constitution.

II
Analysis

We turn first to the trial court's commerce clause determination. United States Constitution, article 1, section 8, clause 3, grants Congress the power "[t]o regulate commerce . . . among the several States . . . ." This provision was intended to foster development and maintenance of a national common market among the states and to eradicate trade barriers. (See, e.g., *Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 523 ["The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long

run prosperity and salvation are in union and not division."]) Indeed, "[r]ecognition of [this] predominant goal . . . has premeated judicial interpretations of state power to regulate commerce." (Nowak, Rotunda & Young, Constitutional Law (2d ed. 1983) 267-268.)

It is today established that state or local regulation of interstate commerce will be upheld if it " 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.' " (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 640, quoting *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142.) Still, "experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular [commerce clause] case." (*Raymond Motor Transp., Inc.* v. *Rice* (1978) 434 U.S. 429, 440-441.) One additional, albeit less recently relied-on approach to review of state or local action under the commerce clause provides that burdens will be voided if the regulation governs "those phases of the national economy which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority." (*Southern Pacific* v. *Arizona* (1945) 325 U.S. 761, 767; see also *Edwards* v. *California* (1941) 314 U.S. 160, 176; *Minnesota Rate Cases* (1913) 230 U.S. 352, 399-400; *Leisy* v. *Hardin* (1890) 135 U.S. 100, 108-109; *Cooley* v. *Board of Wardens* (1852) 53 U.S. (12 How.) 299, 319.) The absence of Congressional action respecting such economic matters is not controlling because, as has been long established, the commerce clause limits state power by its own force. (*South Carolina State Highway Dept.* v. *Barnwell Bros.* (1937) 303 U.S. 177, 185-186; *Cooley* v. *Board of Wardens, supra*, 53 U.S. (12 How.) 299; see generally *Edgar* v. *MITE Corp., supra*, 457 U.S. 624, 640.)

Plaintiff claims, as a preliminary matter, that it cannot be subject to commerce clause review for three reasons. First, it asserts, such review is precluded by the law of the case doctrine—which generally binds all subsequent proceedings, trial or appellate, to prior appellate determinations in the same action—because defendants raised the commerce clause issue in

their petition for rehearing in *Raiders I*. Law of the case doctrine, however, does not extend to points of law that might have been but were not presented *and determined* on a prior appeal. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179, and cases cited.) Because the briefs in *Raiders I* contained nothing on the commerce clause issue and because denial of rehearing decides nothing on points raised for the first time in the rehearing petition (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 513), law of the case did not preclude commerce clause review in the trial court.

Second, plaintiff asserts it is exempt from scrutiny under the commerce clause because it has merely attempted to enter the market as a participant, not a regulator. (See *South-Central Timber Development, Inc. v. Winnicke* (1984) ___ U.S. ___ [104 S.Ct. 2237, 2243]; *White v. Massachusetts Council of Const. Employers* (1983) 460 U.S. 204, 206-208; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 436-437, 440; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794, 809-810.) Although plaintiff would escape commerce clause review if it had in fact acted as a mere market participant—i.e., if it had attempted to enter the football market on an equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to sell—it does not escape commerce clause review in this situation in which its action is grounded on its governmental power of eminent domain that it possesses as an agent of a sovereign, the State of California.[1] (Cf., *Reeves v. Stake, supra*, 447 U.S. 429, 437 [commerce clause applies to "actions taken by states in their sovereign capacity" but does not limit proprietary activity].) Here the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's "most awsome grant of power"—eminent domain. (*Winger v. Aires* (1952) 371 Pa. 242, 244 [89 A.2d 521, 522].)

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[1] Cities, unlike states, lack inherent power to condemn. (*Raiders I, supra*, 32 Cal.3d at pp. 64-65; Comment, *Anticipating an Instant Replay: City of Oakland v. Oakland Raiders* (1984) 17 U.C. Davis L.Rev. 963, 976.)

Third, plaintiff contends exercise of eminent domain power can never violate the commerce clause and notes that no previous case has precluded an eminent domain taking under that constitutional provision. The lack of such case law, however, is unremarkable; it serves merely to point out that eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce. Whether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case.[2]

It is well established that a state may exercise eminent domain power even though by so doing it indirectly or incidentally burdens interstate commerce. (See *Elberton Southern Ry. Co. v. State Highway Dept.* (1955) 211 Ga. 838, 841 [89 S.E.2d 645, 649], and cases cited.) Defendants, however, contend that professional football is such a nationwide business and so completely involved in interestate commerce that acquisition of a franchise by an individual state through eminent domain would impermissibly burden interstate commerce. A recent Supreme Court decision, *Partee v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, supports this view.

Partee held that the NFL required nationally uniform regulation and that interstate commerce would be unreasonably burdened if state antitrust laws applied to a League franchise located in this state. Uniform nationwide regulation was called for because "Professional football's teams are dependent upon the league playing schedule for competitive play. . . . The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business

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[2] Contrary to plaintiff's urgings, nothing in *Hayfield Northern R. v. Chicago & N.W. Transp.* (1984) ___ U.S. ___ [104 S.Ct. 2610], persuades us that the eminent domain action here is exempt from commerce clause analysis.

enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state." (*Id.*, at pp. 384-385.)

The same situation is presented here. Indeed, the trial court's findings track and amplify on *Partee*. Regarding the interdependent character of the NFL, the court noted that each team is substantially dependent for its income on every other team: League television contract proceeds are divided equally and gate receipts nearly equally; a team's drawing power is therefore a financial benefit to the other teams as well as to itself; hence the capacity and quality of the facility in which games are played is a component of the League's financial success. The court also found evidence of the necessity of a nationwide League structure: based on the above factors, each League franchise owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner. Thus, under League bylaws, new members must first be approved by the current members. In short, although the clubs compete to an important degree, the League is also a joint venture of its members organized for the purpose of providing entertainment nationwide. Finally, the court found that a bar to relocation on the basis of state eminent domain law would adversely affect the League enterprise. An involuntarily acquired franchise could, at the local government's pleasure, be permanently indentured to the local entity. The League's interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc. As the trial court found, it must also be anticipated that a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation.

Plaintiff's proposed action would more than indirectly or incidentally regulate interstate commerce: plaintiff claims authority—pursuant to authorization found in state eminent domain statutes—to bar indefinitely defendant's business from relocating out of Oakland. This is the precise brand of parochial meddling

with the national economy that the commerce clause was designed to prohibit.

As shown above, relocation of the Raiders would implicate the welfare not only of the individual team franchise, but of the entire League. The spectre of such local action throughout the state or across the country demonstrates the need for uniform, national regulation. In these circumstances (and apart from other potential bases of commerce clause violation[3], if relocation threatens disproportionate harm to a local entity, regulation—if necessary—should come from Congress;[4] only then can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a

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[3] It might be argued that plaintiff's attempted exercise of eminent domain would be analogous to a local embargo or prohibition of outgoing commerce—a practice frequently designated a per se violation of the commerce clause. (Nowak, Rotunda & Young, *supra*, pp. 284, 286-287; see also Note (1983) 4 Pace L.Rev. 169, 191-192 [eminent domain acquisition of the Raiders would impermissibly burden interstate commerce by reducing the number of businesses that pass through such commerce].) The trial court touched on a similar point when it stated, "it would seem essential to the welfare of any business in a free enterprise system that it be substantially free to relocate to a better economic environment to maintain or enhance its viability." (Cf., *Nash* v. *City of Santa Monica* (1984) 37 Cal.3d 97, 111-121, and cases cited (Mosk J., dissenting) [discussing an individual's right to go out of business]; *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. 137, 145 ["the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere"].) Whether such a broadly stated proposition may ultimately prove correct, however, need not be decided here. We are not faced with the question of whether, consistent with the commerce clause, a local government may prevent relocation of a business that, although producing goods that eventually flow in interstate commerce, is not an interdependent component part of an interstate joint venture such as the NFL.

[4] Note, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation* (1985) 13 Fordham Urban L.J. 553.

uniform manner. (*Partee v. San Diego Chargers Football Co., supra,* 34 Cal.3d 378, 385.)

Our supreme court in *Partee* held this state's legitimate interest in enforcing our own antitrust laws against a League franchise was outweighed by the burden such enforcement would impose on interstate commerce. Plaintiff here does not seek to promote the health or safety of its citizens, or even, as in *Partee,* promote fair economic competition. Instead it seeks to act for what may be presumed, for purposes of analysis, to be legitimate, but less compelling reasons: to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played.

We conclude, as did *Partee* in a similar context, that the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise.

Our conclusion on the commerce clause obviates the need for further consideration of the public use and antitrust arguments.

Judgment is affirmed.
CERTIFIED FOR PUBLICATION.

Sabraw, J.

WE CONCUR:

Anderson, P.J.

Channell, J.

Appendix B

Order Denying Review
After Judgment by the Court of Appeal
1st District, Division 4, No. AO29031
In the Supreme Court of the State of California
[Filed Feb. 27, 1986]

IN BANK

THE CITY OF OAKLAND

v.

THE OAKLAND RAIDERS, et al.

Broussard, J. and Panelli, J., did not participate

Appellant's petition for review DENIED.

Reynoso, J., is of the opinion the petition should be granted.

Bird
Chief Justice

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1969

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF OAKLAND,
a charter city and municipal
corporation,

Petitioner,

vs.

THE OAKLAND RAIDERS, et al.,

Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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24pp.

QUESTION PRESENTED

Does the imposition of "appropriate limitations" by the California courts on the exercise of California's statutory power of eminent domain, by a subordinate political entity, warrant review by this Court, where the "appropriate limitations" are based on findings of the California courts that California's local interest does not outweigh the burden that would be imposed on interstate commerce?

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No. 85-1969

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF OAKLAND, a charter city and municipal corporation,

Petitioner,

vs.

THE OAKLAND RAIDERS, et al.,

Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

Respondent Los Angeles Memorial Coliseum Commission respectfully opposes the Petition for a Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

This action was commenced in February, 1980, by the petitioner herein, the City of Oakland, California (City) under the provisions of the California Eminent Domain Law (California Code of Civil Procedure Sections 1230.010 et seq.). Through the use of California's Eminent Domain law, the City attempted to block the move, from the City of Oakland to the City of Los Angeles, of a football team which was then known as the "Oakland Raiders" which was to play in this respondent's Coliseum. (See City of Oakland v. Oakland Raiders 32 Cal.3d 60, 63, 183 Cal.Rptr. 673, 675 (1982).)

In June, 1980, the action was dismissed by the trial court's entry of summary judgment. The trial court's decision was based on its finding a lack of a "public use", which is a necessary component for any eminent domain action. The dismissal was affirmed on appeal to the California Court of Appeal, although the affirmance was on the different ground that intangibles not connected with real property are not subject to condemnation under California law.

The California Supreme Court granted review and held that intangible property could be the subject of an eminent domain action under California law. (City of

Oakland v. Oakland Raiders, supra, 32 Cal.3d at 68, 183 Cal.Rptr. at 678.)

As to the remaining issues in this condemnation action, the Court simply stated that the "City and the Raiders should be afforded a full opportunity before a trial court to present the 'facts and circumstances' of their respective sides during a trial on the merits." (32 Cal.3d at 76, 183 Cal.Rptr. at 683.)

The California Supreme Court also noted that: ". . . the facts and circumstances developed at trial may be of substantial assistance in the formulation of any appropriate limitations on the exercise of such power (eminent domain)." (32 Cal.3d

at 75, 183 Cal.Rptr. at 682.) (Emphasis added.)

After remand from the California Supreme Court but before trial, and following the decision in its favor in Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984), this respondent, Los Angeles Memorial Coliseum Commission, entered this case pursuant to the provisions of California Code of Civil Procedure Section 1250.230.

The "facts and circumstances" of this case were presented during a seven-week trial during May and June of 1983, in Monterey County,

California. Twenty-nine (29) witnesses testified, there were more than 200 exhibits, in addition to masses of material of which the court took judicial notice, and a transcript that is 5724 pages long. The trial court's eventual findings consist of 72 pages of text and held, on many independent grounds, that the City could not acquire the property under California's Eminent Domain law.

On July 22, 1983, the trial court filed its "Intended Decision" (3 C.T. 1436-1479) ordering the dismissal of the action. The Judgment was entered on August 5, 1983. Thereafter, a series of what were termed by the court below as "procedural maneuvers" occurred. (Pet. App.2a.)

Once again, however, on July 16, 1984, after additional proceedings, the trial court issued a decision holding that the City could not acquire the Raiders. The trial court's "Tentative Decision" of July 16, 1984 (C.T. 288-312), was adopted and incorporated in its entirety in the "Statement of Decision" (C.T. 326-328) which was filed on August 10, 1984. Among the findings of the trial court supporting its conclusion that the City could not condemn the Raiders was the finding that there was "no reasonable probability that the franchise would ever be put to the stated public use". (C.T. 299.) The trial court found essentially that the City would

never be able to accomplish its objective because of barriers imposed by the Constitution and By-Laws of the National Football League (C.T. 295); the federal court injunction issued in the Los Angeles Memorial Coliseum v. National Football League, supra, litigation (C.T. 296); and barriers imposed by the California Eminent Domain law (C.T. 296).

The trial court also found that "[t]he City willfully failed to follow the procedure and give notice required by law", (C.T. 305) and that "[t]he action was filed for the arbitrary and capricious purpose of restraining the Raiders after bad faith negotiations by the Coliseum Commission had failed

to consummate a new lease." (C.T. 305.) The trial court further found that "[s]trong proof of the misuse of the eminent domain process also rests in the lack of evidence before the governing body when the resolution was adopted." (C.T. 305.) Based on these findings the trial court found that the adoption of the City's resolution, which authorized the condemnation action, had been "influenced by (a) gross abuse of discretion." (C.T. 306.)

The trial court additionally found that the "public interest and necessity", necessary components to a condemnation action under California law, "do not require the acquisition of the Raiders" (C.T. 306). A number

of additional grounds to defeat the taking were also found by the trial court in addition to those mentioned in the decision of the court below.

The California Court of Appeal filed its decision affirming the trial court's dismissal of the action on November 15, 1985. The City petitioned the California Supreme Court for review, which was denied on February 28, 1986. This petition follows.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal in this case is

consistent with the applicable precedent of this Court and concerns only the petitioner's "parochial" interests. (Pet. App. 6a.) By deciding that California's local interest was not sufficient to outweigh the burden that the petitioner's "parochial meddling with the National economy" would cause (Pet. App. 6a-7a), the court below simply placed an appropriate limitation on the exercise of California's statutory power of eminent domain by a subordinate political entity.

ARGUMENT

THIS CASE RAISES NO ISSUE OF FEDERAL STATUTORY OR CONSTITUTIONAL LAW WHICH THIS COURT NEED DECIDE.

There can be no doubt that the commerce clause imposes a limitation upon the power of the states without the need for implementing legislation by Congress. Great Atlantic & Pac. Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370-371 (1976); Freeman v. Hewitt, 329 U.S. 249, 252 (1946).

The petitioner's position is directly contrary to this settled law. The petitioner argues:

> "The City's power to acquire the Raider's NFL franchise by eminent domain should be affirmed in the absence of any inhibiting action by Congress pursuant to the Commerce Clause." (Pet. p.8.)

The court below applied the correct standard to its review of the Commerce clause issue, declining petitioner's suggestion that it depart from precedent. (Pet. App. 3a.)

The court below commenced its review of the issue with the "facts and circumstances" that were developed during the trial and found by the trial court. That analysis was entirely appropriate because what constitutes an impermissible burden on interstate commerce is always a question of fact. See e.g., Raymond Motor Transp., Inc. v. Rice, 434 U.S.

429, 447 (1978). The court below carefully considered the facts in light of a relevant recent California Supreme Court case, Partee v. San Diego Chargers Football Co., 34 Cal.3d 378, 194 Cal.Rptr. 367 (1983), cert. denied, 80 L.Ed.2d 153 (1984) (Pet. App. 6a). Based upon its review of the facts, the court below found that the "proposed action would more than indirectly or incidentally regulate interstate commerce." (Pet. App. 6a.) The court further found that "[t]his is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit." (Pet. App. 6a-7a.) Based on those findings, the court concluded that:

> "the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise." (Pet. App. 8a.)

So in essence, the court below correctly applied the relevant precedent of this Court (see page 13 supra) to place an "appropriate limitation" on the petitioners exercise of California's statutory power of eminent domain.

Contrary to the petitioner's urging (Pet. p. 8), the petitioner does not possess an "inherent" right to use the power of eminent domain but may exercise it only when expressly authorized to do so by law. (City of Oakland v. Oakland Raiders, supra, 32 Cal.3d 64, 183 Cal.Rptr. at 676.)

The petitioner further attempts to avoid judicial review of its actions by arguing that it is a mere "market participant." (Pet. pp. 11-14.) This argument, of course, has no basis in fact or law. As the court below noted: "[h]ere the City does not even cross the threshold of the marketplace except by first exercising what has been characterized as a soverign's 'most awsome grant of power' - eminent domain." (Pet. App. 4a.) Accordingly, this argument is without merit.

The City's final argument (Pet. pp. 14-18), appears to be an attempt to re-argue the findings of fact made by the courts below. As this Court has held on many occasions, "a court

of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1948). This argument is also without merit.

CONCLUSION

More than six years have passed since this action was filed. The Raiders have been known as the Los Angeles Raiders for the last four seasons and have played their home games in this respondent's coliseum, the Los Angeles Memorial Coliseum, for

that period. This case has created an unnecessary cloud of uncertainty for the Los Angeles Memorial Coliseum Commission as well as for the Raiders and should be brought to an end by denial of the petition. The case was decided consistent with the applicable precedent of this Court and presents only the "parochial" concerns of the petitioner. It will not, contrary to the urging of the petitioner (Pet., pp. 6-7), effect the exercise of the power of eminent domain by local governments, including the two largest public entities in the State of California, the City of Los Angeles and the County of Los Angeles, whose counsel are representing this

respondent. Accordingly, there is no ground under Rule 17 of the Rules of the Supreme Court to grant the petition, which should therefore be denied.

Respectfully submitted,

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(3)

No. 85-1969

Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city and municipal corporation,
Petitioner,

vs.

THE OAKLAND RAIDERS; ALLEN DAVIS; EDWARD W. MCGAH; LOUIS F. BARROERO; FRANK IVALDI; SHELDON MILENBACH; JOHN BROOKS; EUGENE BOSCACCI; JULIUS S. HARTMAN; GLADYS SARGENT; HENRY TRIONE; RALPH J. VAIL; W. H. WINKENBACH; E. J. MCGAH; DYNAMIC DEVELOPMENT CO.; OLIVER HOMES, INC.; ARNOLD BOSCACCI; ANDREWS CONSTRUCTION CO.; RALPH J. VAIL, Trustee; and LOS ANGELES MEMORIAL COLISEUM,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF OF RESPONDENTS LOS ANGELES RAIDERS (formerly called OAKLAND RAIDERS) AND ITS PARTNERS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. California, through its courts, has held that the interest of the State of California in the taking by a city by eminent domain of a professional football club—a franchise in the National Football League—is too slight to outweigh the impact on interstate commerce and therefore that the State of California has not delegated to the city that sovereign power. Does this present a federal question at all, or, if it does, does it present one sufficient to warrant review or involve more than a question of fact under the "two court rule"?

2. Is there any reason why the power of eminent domain of a state agency is more immune from commerce clause analysis than the other two powers of state sovereignty, *viz.*, taxation and police power?

3. Can a subordinate state agency claim that conduct resting on exercise of coercive government power is merely a "market entrance" immune from the Supremacy Clause?

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Other Authorities

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No. 85-1969

In the Supreme Court

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OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city
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Petitioner,

vs.

THE OAKLAND RAIDERS; ALLEN DAVIS;
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Respondents.

**On Petition for Writ of Certiorari
to the Court of Appeal of California,
First Appellate District**

BRIEF OF RESPONDENTS LOS ANGELES RAIDERS (formerly called OAKLAND RAIDERS) AND ITS PARTNERS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is filed for all respondents other than Los Angeles Memorial Coliseum Commission.[1]

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[1] Those respondents are the Los Angeles Raiders and its present or former partners, general and limited. Edward W. McGah is deceased. No one not named in the caption has an interest in the Los Angeles Raiders.

STATEMENT OF THE CASE

In February, 1980, the City of Oakland, California, the petitioner here, filed this novel and singular suit in a California court in Oakland itself. This was an attempt to seize by eminent domain the football club then known as "Oakland Raiders", a member of the National Football League ("NFL"). The club has been named "Los Angeles Raiders" since the decision of the United States District Court for the Central District of California in *Los Angeles Memorial Coliseum Commission v. National Football League, et al.*, affirmed in *Los Angeles Memorial Coliseum Commission v. National Football League, et al.*, 726 F.2d 1381 (9 Cir. 1984), *cert. denied, National Football League, et al. v. Oakland Raiders, et al.*, ____ U.S. ____, 83 L.Ed.2d 331, 105 S.Ct. 397 (1984).

Confronted in the Oakland court with an *ex parte* restraining order and an interlocutory injunction imprisoning it in Oakland by preventing it from moving operations to Los Angeles, the Raiders utilized California procedure to move the case to a "neutral" county.[2] There, in June, 1980, the court without a trial entered a summary judgment dismissing the case for lack of a "public use", a crucial element to a taking by eminent domain both under the Fourteenth Amendment of the United States Constitution and the Constitution of California.

On appeal by the City, the California Court of Appeal affirmed the judgment of dismissal in 1981. (*City of Oakland v. Oakland Raiders*, 123 C.A.3d 422, 176 Cal.Rptr. 646.) In the lower court the City Attorney had described the City's claim as an "ethereal claim".[3] The basis of the affirmance by the Court of Appeal was that California law did not authorize taking by eminent domain of intangibles not connected with real property and that what was sought to be taken was an intangible, the network of contractual relationships among members of the NFL constituting a football

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[2] The term, "neutral county" is the usual term; see, *e.g.*, *Westinghouse Electric Corp. v. Superior Court*, 17 C.3d 259, 264, 279, 131 Cal.Rptr. 231 (1976).

[3] Reporter's Transcript of March 20, 1980, p. 8.

franchise. The California Supreme Court, granting review, held that intangibles are subject to eminent domain under a revision of California statutory law in 1976. On every other issue in the case, the California Supreme Court merely held that the action should not have been disposed of by summary judgment, and that the City should be given an opportunity to support its claim by evidence at a trial. It reversed and remanded the case for trial and determination on all the " 'facts and circumstances' " (*City of Oakland v. Oakland Raiders*, 32 C.3d 60, 75, 76, 183 Cal.Rptr. 673 (1982)).

One of the defenses on which the case thereafter went to trial was that "[p]rofessional football as played in the National Football League is a business in interstate commerce. . . . " and that "acquisition by plaintiffs of the property sought to be condemned would be unconstitutional as violative of Article I, Sec. 8, Clause 3 of the Constitution of the United States".[4]

Obedient to the direction of the California Supreme Court that the case be determined on all the "facts and circumstances", the trial court received evidence on this and all other issues in a seven week trial in which 29 witnesses testified, more than 200 exhibits were received in addition to masses of material of which the court took judicial notice; the trial transcript occupies some 5,724 pages.

Once again, in August, 1983, the case ended in a judgment that the City take nothing and that the cause be dismissed. There then occurred what the court below has characterized in its opinion as "procedural maneuvers" by the City (Petition, App. 2a), including mandamus proceedings in California appellate courts. Eventually, on August 10, 1984, a final judgment was entered in the trial court denying the City the right to take, based on a "Statement of Decision" required by California Code of Civil Procedure § 632. The Statement of Decision assigned numerous reasons why the suit was dismissed, some constitutional, some statutory or decisional, each reason independently sufficient in itself. The

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[4] 2 Clerk's Transcript, p. 35 at 45.

opinion of the court below mentions three of these reasons (at Pet. App. 2a), namely:

1. The City's purpose in seeking to take was not for a "public use".

2. The taking would violate the Commerce Clause of the United States Constitution. The trial court's decision on this read (Clerk's Transcript 307):

> "The court finds that the involuntary acquisition of the Raider's franchise by the City would unduly burden and obstruct interstate commerce in violation of the Commerce Clause of the U.S. Constitution. (*U.S. Constitution, Article 1, Sec. 8, Clause 3*)"

3. In *Los Angeles Memorial Coliseum Com'n, et al. v. National Football League, et al.*,726 F.2d 1381 (9 Cir. 1984), it was held that NFL and its members had engaged in a conspiracy, in violation of the Sherman Act, to keep the Raiders out of Los Angeles. This Court denied certiorari to that decision, *National Football League, et al. v. Oakland Raiders, et al.*, and *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, et al.*, ____ U.S. ____, 83 L.Ed.2d 331, 105 S.Ct. 397 (1984). The trial court found in this case that the City of Oakland was a party to that conspiracy and that the present eminent domain suit was an act in furtherance of the conspiracy.

Other independent grounds of the judgment were (1) that the attempt of the City to take the property was arbitrary, capricious, and in bad faith, (2) that the adoption and contents of the City Council's resolution to take were influenced and affected by a gross abuse of discretion and were sham, (3) that there was lack of public interest or necessity for the taking as required by California law, (4) that the property was sought to be taken for transfer to private owners and that the California statute permits such a taking only in circumstances not present, (5) that the property sought to be condemned was not within the territorial limits of the City at the time suit was commenced, and (6) that the City commenced the action without complying with the procedures required by statute.

Once again the City appealed, arguing that some of the grounds of the decision were precluded and the others unsound. The Court of Appeal affirmed the judgment this time on the ground that the taking was "parochial meddling with the national economy" (Pet. App. 6a-7a) and held (Pet. App. 8a):

> "We conclude . . . that the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise."

The court therefore found it unnecessary to reach any of the other reasons for dismissal of the suit.

At this juncture the case had been pending for 6 years, had been up and down in the hierarchy of the state court system several times, had been the subject of action in four Courts of Appeal and in the State Supreme Court, had occupied the attention of about 33 judges and justices, had been the subject of about 30 substantive orders, writs, opinions, and decisions in appellate courts, and for years had held in suspense the daily lives of a large number of human beings, the personnel of the Raiders club and organization, who did not know where their homes were to be.

Nevertheless, the City petitioned the California Supreme Court for review, and that court denied the petition on February 27, 1986. The present petition for writ of certiorari followed.

The petition pertains only to the commerce issue.[5] Denial of the petition will end this bedraggled litigation, but the utmost that petitioner could hope for from this Court would leave the case to wend its way, wearily, through the California appellate system for

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[5] There are unwarranted statements of fact in the petition but, as they are not relevant to the issues tendered to this Court, we do not dwell on them: *e.g.*, that the trial "court found that the economy of Oakland would suffer if the franchise were to be removed from the City" (Pet. p. 3). The trial court in fact found (3 Clerk's Transcript 1474): "There is not the slightest evidence that the City's economy or its development projects are endangered by the absence of the Raiders."

at least another year on the other issues, making this case bedfellow of *Jarndyce v. Jarndyce.*

Reasons for Denying the Writ

Contrary to the petitioner's assertion (Pet. p. 4), the decision below does not conflict at all or "in principle"[6] with any decision of this Court, of any court in any other state, or with the Ninth Circuit's decision in the antitrust suit, and it does not work any "extension" of any decision of this Court.

I

THE BASIS OF THE DECISION BELOW IS ESSENTIALLY BOTH FACTUAL ("TWO COURT RULE") AND A QUESTION OF CALIFORNIA LAW, THAT THE STATE OF CALIFORNIA HAS NOT DELEGATED TO THE CITY OF OAKLAND THE RIGHT TO EXERCISE CALIFORNIA'S POWER OF EMINENT DOMAIN FOR THE PURPOSE OF ACQUIRING A FOOTBALL CLUB, A PURPOSE SO MINOR IN COMPARISON WITH THE CONSEQUENT IMPACT ON COMMERCE

As the case comes before this Court it presents no question of general concern. Not the State of California but an inferior state agency sought to exercise eminent domain here. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them", *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). In California the power of eminent domain belongs to the State and not to any subordinate political agency. A California municipality can exercise that power only to the extent that it is delegated to it and authorized by the State, and any claimed authorization is strictly construed against the public agency. "[A]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation and the power is denied", *Harden v. Superior Court,* 44 C.2d 630, 641-642, 284 P.2d 9

[6] Notably, the petition does not claim any conflict; it cautiously interposes the elastic qualifier, "in principle".

(1955); *City & County of San Francisco v. Ross*, 44 C.2d 52, 55, 279 P.2d 529 (1955). Here, by the decision in this case and denial of review by the California Supreme Court, California has announced that California gives slight weight to the local interest of the City of Oakland and *has not delegated to Oakland any right to exercise* eminent domain in these circumstances. The essence of the petition for certiorari is that it asks this Court to reappraise the matter.

The late Julius Sackman, editor of the current edition of the preeminent treatise on eminent domain, *Nichols on Eminent Domain* (rev'd 3d ed. 1983), has referred to Oakland's interest in seeking to condemn the Raiders as *"petty"*. Sackman, "Public Use—Updated *(City of Oakland v. Oakland Raiders)"*, in *1983 Institute on Planning, Zoning, and Eminent Domain* (Southwestern Legal Foundation, Dallas), p. 203. While the California courts have not used Sackman's term, "petty", the State of California has held that the interests of the State in the proposed acquisition of the Raiders is slight and not sufficiently substantial to warrant its impact on interstate commerce. California courts are the final word on what is important, unimportant, or petty to California.

A state's power to affect interstate commerce "is never greater than in matters traditionally of local concern", *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981). It hardly needed a decision to establish that taking a football club is not a matter "traditionally of local concern". In any event the decision below establishes that it is not. In *Partee v. San Diego Chargers Football Co.*, 34 C.3d 378, 194 Cal.Rptr. 367 (1983), it was held that professional football as played in the National Football League is so entirely, intrinsically, and inherently a matter of interstate commerce that not even the California antitrust law could play any part in its regulation. This Court denied certiorari, 466 U.S. 904 (1984).

Petitioner does not really deny that taking the Raiders would burden interstate commerce. The facts are summed up as succinctly as may be in the opinion below (Pet. App. 5a-8a), and it would be unnecessary replication to repeat here. The gist of petitioner's presentation to the California Supreme Court was

that, while there would be a burden on interstate commerce, it would not be "an *undue* burden". And that is the argument made in Part III of the petition (pp. 14-18). What is "undue" is essentially a factual question, because it depends on weighing and balancing a variety of considerations; the inquiry "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce", *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 441 (1978); *Pike v. Bruce Church,* 397 U.S. 137 (1970). Here, upon consideration of all the facts, the trial court found, and the Court of Appeal and the California Supreme Court concurred, that, on weighing the State's interest against the impact on interstate commerce, the latter far outweighed the former. Under the "two-court rule" that conclusion, thus joined in by three state courts, would seem to be one this Court would not elect to review. *Rogers v. Lodge,* 458 U.S. 613, 623 (1982); *United States v. Ceccolini,* 435 U.S. 268, 273 (1978). The petition's assertion (p. 7) that the "rationale of the California Court of Appeal could be applied to" a variety of other situations misses the fact that the court's decision postulated no new law. It applied the established weighing and balancing process to a particular situation upon a particular and detailed factual record. Other situations, other facts, other records, will take care of themselves.

If the California courts had ruled the other way on the commerce issue, a radically different question would be presented to this Court in determining whether the Commerce Clause would be violated. The "two-court rule" has on occasion been relaxed to sustain constitutional protection where the lower court has failed to do so but it has never been relaxed to reverse a decision below that has sustained a constitutional protection. The concept of weighing and balancing conjures up the picture of the two pans of a balance scale; in one pan is the state interest, in the other the national. If the State considers the weight in its pan heavy, this Court nonetheless weighs the national pan and reviews the weight of the other. But if the State itself considers the weight in its pan slight, that should be the end of the weighing and balancing process; a subordinate state agency like a city should not gainsay the State's own conclusions or ask this Court to do so.

II
THE CITY'S OTHER ARGUMENTS UNDERSCORE THE LACK OF MERIT OF ITS POSITION

A. Petitioner's Claim that Exercise of Eminent Domain by a Subordinate State Agency Is Less Subject to the Commerce Clause than Other Governmental Powers Has No Substance

Petitioner's primary contention is not that its action does not unduly burden interstate commerce. Its first contention is that its conduct is shielded from analysis to determine whether it does unduly burden commerce!

In the court below petitioner cited *Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co.*, 467 U.S. 622 (1984), for the contention that the exercise of eminent domain can never be precluded by the Commerce Clause. In a footnote the opinion below disposed of that contention (Pet. App. 5a): "Contrary to plaintiff's urgings, nothing in *Hayfield Northern R. v. Chicago & N.W. Transp.* (1984) ____ U.S. ____ [104 S.Ct. 2610], persuades us that the eminent domain action here is exempt from commerce clause analysis". Petitioner thereupon abandoned the argument when it sought review by the California Supreme Court. Now it resuscitates it in restricted form, urging that the power of eminent domain is not subject to the Commerce Clause absent a statute by Congress.

Neither common sense nor legal reason supports the contention. The Commerce "Clause has long been recognized as a self-executing limitation", *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 87 (1984). The power of government, *i.e.*, of sovereignty, is a single whole. For a state government it consists of three aspects, the power of taxation, the police power, and the power of eminent domain. No reason is assigned why one aspect of this governmental power is any more immune from the supremacy of the federal constitution than the others. Eminent domain is an " 'inherent' attribute of sovereignty" says the petitioner (Pet. p. 8), but it is no more so than the power to tax and the police power, which the petition concedes are subject to the self-executing limitation of the Commerce Clause (Pet. p. 12). Indeed, petitioner confesses that the power of eminent

domain, in the words of the opinion in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), is "coterminous" with the police power (Pet. p. 7).

Petitioner reverts to *Hayfield*, which is not remotely germane. There a federal statute regulated the process by which interstate rail carriers might abandon unprofitable lines, by entrusting the procedure to the Interstate Commerce Commission (ICC). The procedure was followed, the ICC authorized abandonment, the line was abandoned, and the question was whether the abandoned property could be subjected to eminent domain after the abandonment (467 U.S. 625-26, 632-33); the issue was sharply framed as being whether an abandoned line could "properly be viewed as *ordinary real property*" (p. 632, emphasis added).

Until the Supreme Court of California announced that under California law an intangible can be condemned, eminent domain suits by state agencies throughout the country were directed to specific pieces of real property and appurtenant easements, and it would be a rare case where the forcible taking of a piece of real property within a state could burden interstate commerce. Petitioner cites three cases to the subject (at p. 17). *Elberton Southern Ry. Co. v. State Highway Dept.*, 211 Ga. 838, 89 S.E.2d 645 (1955), was a suit by the State (not a subordinate agency) to condemn a 3 mile long slice of a railroad right-of-way in Georgia. So far from even intimating that state eminent domain was not subject to the Commerce Clause, the court recognized that it was, but found no undue burden on interstate commerce as the strip was replaceable by a different right-of-way. *Chicago, R.I.& G. Ry. Co. v. Tarrant County W.C. & I. Dist.*, (Tex.Civ.App.) 76 S.W.2d 147 (1934), concerned the taking of 4 miles of right-of-way in Texas, a gap readily filled by a new link; the issue of interstate commerce was not involved; the only issue was extent of compensation. In *Western Union Telegraph Co. v. Louisville & N.R. Co.*, 270 Ill. 399, 110 N.E. 583 (1915), what was sought to be condemned was an easement to put up telegraph poles on a railroad right-of-way in a manner not incommoding the public use of the railroad. The issue raised was whether a state court had jurisdiction of the suit or whether jurisdiction lay in a federal court. No claim of any burden on interstate commerce was made.

The present case is as different from any of those cited by petitioner as the imagination that created this lawsuit differs from the bar's prior understanding of eminent domain. As found below, a franchise in the National Football League (NFL) is participation in a network or web of contractual relationships for operating interstate businesses. As a break in any strand of a web shakes the whole, intrusion by *coercive force* on any franchise is a disruption of the living tissue of the interstate operations.

Although the petition at page 3 calls the present case and *Los Angeles Memorial Coliseum Com'n v. National Football League, et al., supra,* 726 F.2d 1381 (9 Cir. 1984), "unrelated", on pp. 5, 6, and 15 it inconsistently calls the two "inconsistent". They are both highly related and completely consistent. Petitioner's argument is so murky as to be unintelligible.[7] The decision in the federal case was that the League and its member clubs conspired in violation of the Sherman Act to keep the Raiders imprisoned in Oakland. The decision below is that the City may not accomplish the same imprisonment by eminent domain. The two decisions mesh hand in glove, for the trial court in this case found that the City of Oakland was a party to the Sherman Act conspiracy adjudicated in the federal case and used the eminent domain action as an act in furtherance of that conspiracy. Petitioner's argument comes to this: Having been foiled by the Sherman Act

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[7] One assertion of inconsistency is intelligible but false, *viz.*, that the Ninth Circuit held that NFL and its 28 member clubs were not a "single entity"—which is true—but that the "California court found that the NFL essentially is a single entity or 'joint venture' " (Pet. p. 6). The trial court did refer to "joint venture", but "joint venture" is not the same as "single entity". As noted in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 82 L.Ed.2d 70, 91 (1984), "joint ventures have no immunity from the antitrust laws", whereas, as held eight days earlier in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), "single entity" does. Petitioner has failed to read what the Ninth Circuit clearly wrote. It asserts (on p. 15) that the Ninth Circuit "held that the federal antitrust laws . . . precluded NFL regulation of franchise location". On the contrary, the Ninth Circuit held that under the Rule of Reason there was room for "more closely tailored" regulation than the unreasonable rule and conduct involved in the case (726 F.2d at 1397).

from directly imprisoning Raiders in Oakland, NFL can achieve the same result by not objecting to the eminent domain suit, thereby holding the Commerce Clause at bay.

B. The "Market Participant" Argument

"Coercive force" is the answer to the City's next contention that the Commerce Clause does not apply to action of a state or local governmental entity " 'enter[ing] the market as a participant' " (Pet. pp. 11-14). The Commerce Clause applies whenever a state or agency exercises a *governmental* power, coercive force. This is not a case of the petitioner's seeking to go into the football business by buying a football franchise from someone willing and able to sell. Petitioner sought to obtain the franchise only by the exercise of a power—eminent domain—so supremely that of a sovereign that California's highest courts have called it " 'one of the attributes of sovereignty most fraught with the possibility of abuse and injustice' ", *City of Los Angeles v. Koyer*, 48 Cal.App. 720, 725, 192 Pac. 301 (1920); "one of the most delicate exercises of governmental authority.... to be watched and guarded with jealous scrutiny", *Bensley v. The Mountain Lake Water Company*, 13 Cal. 306, 315 (1859). In the words of the court below, "Here the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's 'most awesome grant of power' — eminent domain. (*Winger v. Aires* (1952) 371 Pa. 242, 244 [89 A.2d 521, 522].)"

The City's citations show how mindless its argument is. In *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983), Boston was not acting in a governmental capacity; it was not exercising the power of a sovereign to regulate or to compel anyone to do what it did not wish to do. It merely chose to entrust work projects financed by the City to contractors who hired certain percentages of local residents; it selected those with whom it chose to deal. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the State of Maryland was not exercising a governmental power to regulate conduct by command. It was *giving* away money by offering a bounty to wreckers who scrapped old automobile hulks in Maryland. The Commerce Clause did not prevent it from choosing to limit its gift to those who acted in the

State. The decision is so explained in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), as dealing with the state's "proprietary activity" (*Id.* at 434, emphasis added), whereas the Commerce Clause is aimed at " 'actions taken by states in their sovereign capacity' " (*Id.* at 437). In *Reeves*, South Dakota had long operated a plant to make cement, not a governmental activity but a commercial activity competing in the private market. It chose to sell the cement which it manufactured to its citizens only, and it was this that was held not to come within the Commerce Clause. Petitioner overlooks the reason of things; expressions by this Court about "market entrance" were not designed to say something esoteric but to distinguish non-coercive action by a state from coercive, *i.e.*, governmental action. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984), puts all this in its place. There Alaska's restriction on sale of state owned timber that it had to be processed in the state was held to violate the self-executing limitations of the Commerce Clause because, while sale of state timber might be a market transaction, restriction on its use was exercise of governmental power. *A fortiori*, if operating a football team, once acquired, might be a market operation, it could not have been acquired without first exercising the government's coercive power.[8]

Moreover, the City of Oakland's purpose in seeking to seize the Raiders was not to become a market participant. It sought to use the power of eminent domain to prevent the Raiders from moving from Oakland, a kind of regulation that the City lacked power to effect directly. As the trial court held, "the court finds that the eminent domain process was not instituted by the City in order to

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[8] In fact, petitioner could never operate the team. NFL's general counsel testified that in order to play games in the NFL, it would be necessary for the City to be a member (Reporter's Transcript 4953), but the City could never be a member because NFL's Constitution and Bylaws provide that only an entity organized for the purpose of operating a professional football club is eligible for membership and that an entity not operated for profit is not eligible (P.Ex. 104). The trial court found (Clerk's Transcript 295): "The evidence thus discloses not the slightest possibility that Oakland would be permitted the ownership or control of a league franchise."

acquire The Raiders, but to confine the club and influence it to negotiate a new licensing agreement with the Oakland-Alameda Coliseum Commission" (Clerk's Transcript 301). As disclosed in the opinion of the California Supreme Court in *City of Oakland v. Oakland Raiders, supra,* 32 C.3d at 73-74, the City told that court that it was not intending to acquire the Raiders in order to enter the football market by operating a football club but in order to transfer the club to someone who would bind itself to keep the club in Oakland. That is regulation, not "market participation". It is *South-Central Timber Dev., v. Wunnicke, supra.* And the petition repeatedly tells this Court that petitioner's purpose was to protect the City's "economy", to satisfy the "need" of the public for recreation, and the like (*e.g.,* Pet. p. 3).[9]

Conclusion

In this case the supremacy of state law relative to matters of state concern and the supremacy of the national constitution relative to matters of national concern unite to deny petitioner's suit.

From the outset, this suit and NFL's resistance to the Raiders' antitrust suit based on NFL's barring the Raiders from Los Angeles have washed each other's hands. The City and NFL have acted in concert to the end and purpose of keeping the Raiders imprisoned in Oakland. Through its agent, Oakland-Alameda County Coliseum, Inc., the City intervened in the antitrust suit on the side of NFL, and it furnished to NFL witnesses whom the City also called in its own case. (See, *e.g.,* the Petition for Certiorari to this Court in *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, et al.,* ____ U.S. ____, 83 L.Ed.2d 331, 105 S.Ct. 397 (1984).) In turn, NFL furnished evidence to the City in this case, both by affidavit (see, *e.g., City of Oakland v.*

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[9] These were the City's avowed purposes, but they would not be the result of the taking. For example, the trial court found: "In terms of recreation, the evidence fails to support City's contention that the Raiders are necessary, in eminent domain law, to facilitate enjoyment of professional sports or even professional football" (3 Clerk's Transcript 1475).

Oakland Raiders, supra, 32 C.3d at 73) and by the live testimony of its general counsel. Throughout, the City and NFL have collaborated and consulted.

This Court denied the petitions for certiorari filed by NFL and Oakland-Alameda County Coliseum in the antitrust case (see p. 2, *supra*). We respectfully submit that it should deny the City's petition here.

Dated: San Francisco, California, June 3, 1986.

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Supreme Court, U.S.
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No. 85-1969

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city
and municipal corporation,
Petitioner,

v.

THE OAKLAND RAIDERS; ALLEN DAVIS;
EDWARD W. MCGAH; LOUIS F. BARROERO;
FRANK IVALDI; SHELDON MILENBACH; JOHN BROOKS;
EUGENE BOSCACCI; JULIUS S. HARTMAN; GLADYS SARGENT;
HENRY TRIONE; RALPH J. VAIL; W.H. WINKENBACH;
E. J. MCGAH; DYNAMIC DEVELOPMENT CO.;
OLIVER HOMES, INC.; ARNOLD BOSCACCI;
ANDREWS CONSTRUCTION CO.; RALPH J. VAIL, Trustee;
and LOS ANGELES MEMORIAL COLISEUM,
Respondents.

**On Petition for a Writ of Certiorari
to the Court of Appeal of California,
First Appellate District**

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THE CITY OF OAKLAND, a charter city
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**On Petition for a Writ of Certiorari
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PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

This case raises fundamentally important questions about the separation of powers between the judicial and legislative branches, and between the federal and state governments. In this case, a California court abrogated the authority of the City of Oakland to exercise eminent domain powers which, contrary to

the Raiders' allegation on page 7 of their brief, were *specifically delegated* to it by the State's legislature. The lower court based its decision solely on dormant Commerce Clause grounds, in the absence of any action by Congress to preempt, regulate, or even affect the field. This judicial invalidation of inherent state powers occurred without the minimum federal political protection required by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985).

The Raiders' brief in opposition addresses none of the above issues, does not refer even once to *Garcia*, and fails to explain why the lower court reasoning would not invalidate a host of other state and local eminent domain actions. Instead, the Raiders raise a new "two court" argument. This argument is invalid because the interest of the State and the City in acquiring the Raiders' franchise has been accepted as legitimate by the California Supreme Court and Court of Appeal in this action, and because no federal interest recognized by this Court would be infringed upon by this acquisition. The balance scale "weighing" analogy offered by the Raiders compels a decision in favor of the City. There are recognized weights in the state's pan, however light the Raiders may argue them to be, but there are no weights at all in the federal pan.

ARGUMENT

The Commerce Clause issue was one of the twenty-eight separate affirmative "defenses"[1] raised by the Raiders. 2 C.T. 226. Contrary to the suggestion on page 4 of the Raiders' brief, almost all of the Raiders' other "defenses" were either abondoned at trial, dismissed by the trial court, foreclosed by the California Supreme Court in *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P. 2d 835 (1982), or rejected by the California Court of Appeal in *City of Oakland v. Superior Court*,

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[1] California does not recognize "defenses" to condemnation actions. Property owners are permitted to raise *objections* to the taking of the property. Cal. Code Civ. Proc. § 1250.360. The Commerce Clause was not raised by Respondent Los Angeles Memorial Coliseum among its sixteen "affirmative defenses." 2 C.T. 171.

150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983).[2] The Commerce Clause was the sole basis for the decision which the City seeks to have this Court reverse. As stated by the Court of Appeal, "Our conclusion on the commerce clause obviates the need for further consideration of the [remaining] public use and antitrust arguments." Petition, Appendix 8a.

The Raiders contend that by "denial of review by the California Supreme Court, California has announced that California gives slight weight to the local interest of the City of Oakland. . . ." Raiders' brief, page 7. That contention distorts California law and procedure. Denial of a petition for review by the California Supreme Court is not an expression of the Supreme Court's opinion on the merits of the case, or on the correctness of the judgment or any statements in the Court of Appeal opinion. *People v. Triggs*, 9 Cal.3d 884, 890, 106 Cal.Rptr. 408, 412, 506 P.2d 232, 236 (1973); *People v. Davis*, 147 Cal. 346, 350, 81 P. 718, 720 (1905); cf. California Constitution, article 6, section 11.

The California Supreme Court's view of the City's action is expressed only in its opinion in *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 183 Cal.Rptr. 673. 646 P.2d 835 (1982). There, the court rejected the Raiders' primary arguments and held that the Raiders' franchise was "property" subject to eminent domain.

> Government Code section 37350.5, as amended, provides: "A city may acquire by eminent domain *any property* necessary to carry out any of its powers or functions." [Italics by the court.]
>
> [This] law appears to impose no greater restrictions on the exercise of the condemnation power than those which are

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[2] The trial court's first set of conclusions was vacated by the California Court of Appeal in 1983. *City of Oakland v. Superior Court*, 150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983). The trial court judgment based on six independent reasons was vacated as being erroneous as a matter of law. The Raiders' contentions, also on page 4 of their brief, of "conspiracy" are irrelevant misrepresentations of the trial court's conclusions and merely restate positions of the Raiders which the trial court refused to adopt. See, e.g., 3 C.T. 311-313, 1445.

> inherent in the federal and state Constitutions. Further, the power which is statutorily extended to cities is not limited to certain types of property.

32 Cal.3d at 65, 183 Cal.Rptr. at 676, 646 P.2d at 838, citation omitted. The court then reviewed the public use doctrine as it relates to public recreation:

> The example of Candlestick Park in San Francisco and Anaheim Stadium in Anaheim, both owned and operated by municipalities, further suggest the acceptance of the general principle that providing access to recreation to its residents in the form of spectator sports is an appropriate function of city government.

Id., 32 Cal.3d at 71, 183 Cal.Rptr. at 680, 646 P.2d at 841. The California Supreme Court recognized the essential need to preserve the separation of governmental powers in this case:

> We caution that we are not concerned with the economic or governmental wisdom of City's acquisition or management of the Raiders franchise, but only with the legal propriety of the condemnation action. In this period of fiscal constraints, if the city fathers of Oakland in their collective wisdom elect to seek the ownership of a professional football franchise are we to say them nay? And, if so, on what legal ground? Constitutional? Both federal and state Constitutions permit condemnation requiring only compensation and a public use. Statutory? The applicable statutes authorize a city to take "any property," real or personal, to carry out appropriate municipal functions. Decisional? Courts have consistently expanded the eminent domain remedy permitting property to be taken for recreational purposes.

Ibid. The point was reaffirmed by the court in its concluding paragraphs:

> [T]he Raiders assert its view that a professional football franchise is not a proper subject for eminent domain. We repeat what is necessarily implicit in our opinion: *Under the present statutory scheme, the courts have no authority to*

> *choose those items of property which they deem appropriate for condemnation.*

Ibid., 32 Cal.3d at 76, 183 Cal.Rptr. at 683, 646 P.2d at 845, italics added.

The California Supreme Court decision held that the Raiders' property could be acquired by eminent domain under state law, that the City was authorized by the California Legislature to exercise the State's power in this manner, that the City's recreational purposes were consistent with traditional public use doctrines adopted in California as well as other states, and that the judiciary is not empowered to question or evaluate the wisdom of this exercise of legislative power. These holdings repudiate the Raiders' assertion that, under the "two court rule," California gives "slight weight to the local interest of the City of Oakland and has not delegated to Oakland any right to exercise eminent domain in these circumstances." Raiders' brief, p. 7.

The Raiders' "two court rule" and "slight weight" argument is further undercut by the lower court decision which the City asks this Court to review. The California Court of Appeal belittled the City's interest in acquisition of the Raiders' franchise, but nevertheless "presumed . . . legitimate . . . reasons: to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played." Petition, Appendix 8a. These are legitimate public purposes as a matter of law. See: *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

The Raiders have asked this Court to "conjure up the picture of the two pans of a balance scale; in one pan is the state interest, in the other the national." Raiders' brief, p. 8. As shown above, the state's interest is both substantial and legitimate, as recognized by the California Supreme Court and as presumed by the California Court of Appeal. Under the three arguments advanced by the City in its petition to this Court (Petition, pages 4-18), there is nothing to be placed in the "national" (federal) pan and no weighing by the judiciary is necessary.

First, under *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), no judicial weighing should occur because the City's sovereign power of eminent domain should not be curtailed by the dormant Commerce Clause in the absence of Congressional deliberation and action. Petition, pages 8-10. Cf. *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 54 U.S.L.W. 4505, 4509-4512 (U.S., May 27, 1986) (Nos. 84-871, 84-889, 84-1054, 84-1069).

Second, the market participant doctrine prohibits any weight being placed in the federal balance pan. The City's point, which is not discussed in the opposing briefs, is that almost all of the supposed burdens on interstate commerce identified by the Court of Appeal are not a necessary consequence of this action. These burdens could arise, if at all, only from City *participation* in the market *after* acquisition of the NFL franchise by eminent domain. Even if, after acquiring the Raiders' franchise, the City were to act in such a way as to burden the commerce of the National Football League, such acts would not be subject to Commerce Clause restrictions because of the market participant doctrine. Although the Raiders describe the applicability of that doctrine to the present case as "mindless" (Raiders' brief, p. 3), there are no legally or logically significant reasons for distinguishing this case from *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In each of those cases, the local government was participating in the market place in order to accomplish a public purpose, and using its governmental powers to do so.

Third, all the burdens upon commerce identified by the lower court are indirect and insubstantial. As such, they do not violate the Commerce Clause and no federal interest is placed upon the balance pan. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). None of these supposed "burdens" —hypothetical restrictions upon NFL franchise owners, an "allegiance to the local public interest," or the fear of "a single precedent"—has any weight. The NFL's commerce cannot be burdened because the NFL itself can easily eliminate every identified burden. The NFL never has opposed the City's action

and it has actively opposed the Raiders' move from Oakland to Los Angeles. The NFL wants this franchise in Oakland.[3] Because the NFL may itself remove any perceived burden on its commerce, no weight may be placed upon the federal pan.

CONCLUSION

This is not a "two court rule" case. This is an eminent domain case where a state appellate court has held that, even in the absence of Congressional action, the exercise of the state's sovereign power of eminent domain violates the Commerce Clause of the Constitution of the United States. That decision is an impermissible extension of judicial power under the dormant Commerce Clause. As described in the City's petition to this Court, the lower court's decision conflicts with decisions of this Court, with a decision of the Ninth Circuit Court of Appeals,[4] and with

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[3] See generally: *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, (9th Cir., June 16, 1985) (Nos. 83-5907, 83-5908, 83-5909).

[4] The City's argument, which the Raiders found "so murky as to be unintelligible" (brief, p. 11), is simply this: the Ninth Circuit found that a franchise owner's interest in relocation outweighed the NFL's interest in preventing relocations. Here, the state appellate court found that the interest of the City—as an owner—in keeping the franchise in Oakland was outweighed by the NFL's supposed interest in freely movable franchises. Because both decisions ultimately are based on the Commerce Clause, (antitrust and "undue burden"), the decisions are in conflict.

the decisions of other state courts. Review and reversal of the decision is necessary to prevent unwarranted attacks—based upon dormant Commerce Clause grounds—on many state and local government actions.

Dated: June 18, 1986.

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